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ALEXANDER L. STEVAS,
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81-2109

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ABDULLAH DOHAISH, *Petitioner*,

v.

DALE TOOLEY, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether a state prosecutor is a "court of last resort" when exercising his prosecutorial discretion in not prosecuting an accused murderer where evidence of probable cause is available or has been established at a preliminary hearing.

II

Whether a state prosecutor may, when exercising his discretion, base his decision not to prosecute an accused murderer on suspect criteria such as race, religion, nationality or national origin.

III

Whether a father has standing to bring an action under the Constitution and Civil Rights statutes against a state prosecutor who intentionally fails to prosecute the accused murderer of his son because of criteria such as the race, religion or national origin of the father and son and where probable cause

TABLE OF CONTENTS

	Page
Question Presented.	i
Table of Authorities.	v
Opinions Below.	ix
Jurisdiction.	ix
Constitution, Treaties and Statutes.	ix
Statement of the Case	1
Reasons for Granting the Writ . .	14
I. A state prosecutor should not be a "court of last resort" when exercising his prosecutorial discretion in not prosecuting an accused murder where eivdence of probable cause is available or has been established at a preliminary hearing . . .	14
A. The Role of the Judiciary Under the Consitution	14
B. The Law Regarding Immunity of Prosecuting Attorneys	16
1. Imbler v. Pachtman.	16
2. Butz v. Economou. .	20

Page

II. A state prosecutor may not, when exercising his discretion, base his decision not to prosecute an accused murder on suspect criteria such as race, religion, nationality or national origin 23

III. A father has standing to bring an action under the Constitution and Civil Rights statutes against a state prosecutor who intentionally fails to prosecute the accused murderer of his son because of criteria such as race, religion or national origin of the father and son and where probable cause exists that the accused is in fact a murderer 25

A. 42 U.S.C. Section 1988 29

B. Fourteenth Amendment Stanley v. Illinois. . 34

Conclusion 29

Appendix A: Judgement and Opinion of the United States Court of Appeals for the Tenth Circuit. . 1

Appendix B: Order of Dismissal of the United States District Court for the District of Colorado 1

Page

Appendix C: Letter dated February 21, 1979, from Reda A. Kabli, Ph.D., Saudi Arabian Educational Attache to the United States of America to Hon. Dale Tooley, District Attorney, Denver, Colorado . . . 1

Appendix D: Letter dated March 12, 1979, from Dale Tooley, District Attorney, Denver, Colorado, to Dr. Reda A. Kabli, Saudi Arabian Educational Attache. 1

TABLE OF AUTHORITIES

Citations	Page
Constitution	
U.S.C.A. Const. art. 6, Cl. 2 & 3	16
Treaties	
U.S.T. 20.3.2804 TIAS 6749. . .	1
Statutes	
Section 13-20-101(1), C.R.S 1973	32, 35
Federal Cases	
Bell v. Hood, 327 U.S. 678 (1946)	28
Butz v. Economou, 438 U.S. 478 (1978)	20, 21, 22, 26, 29
Carey v. Piphus 435 U.S. 247 (1978)	31
Davis v. Passman 442 U.S. 228 (1978)	27, 28
Imbler v. Pachtman 424 U.S. 409 (1976)	12, 15, 17, 18, 19, 23, 39

Page

Jacobson v. Rose,
592 F.2d 515 (9th Cir. 1978) . . 17

Johnson v. Railway Express
Agency, Inc.,
421 U.S. 454 (1975). 31

Marbury v. Madison,
1 Cranch 137, 2 L.Ed. 60(1803) . 16, 37

Martin v. Hunter's Lessee,
1 Wheat 304, 4 L. Ed. 97 (1816). 16, 37

McCulloch v. Maryland,
4 Wheat. 316, 4 L. Ed. 579 (1819) 27,

Mitchum v. Foster,
407 U.S. 255 (1972). 17, 31

Monroe v. Pape,
365 U.S. 167 (1961). 32,

Moor v. County of Alameda,
411 U.S. 693 (1973). 30,

Robertson v. Wegman,
436 U.S. 584 (1978). 29, 30, 32, 33

Scheuer v. Rhodes,
416 U.S. 232 (1974). 18,

Stanley v. Illinois,
405 U.S. 645 (1972). 34, 35

Page

Sullivan v. Little Hunting Park, Inc. 396 U.S. 229 (1969). 31

United States v. Bennett, 539 F.2d 45 (10th Cir.), cert. den. 429 U.S. 925 (1976). . . 24

United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973) . 24

United States v. Berrios, 501 F.2d 1207 (2d. Cir. 1974). 23, 25

United States v. Bourque, 541 F2d. 290 (1st. Cir. 1976). 24

United States v. Dog Crow, 532 F.2d 1182 (8th Cir. 1976), cert. den. 97 S.Ct. 1547 (1977) 24

United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978) 23, 24

United States v. Kelley, 556 F.2d 257 (5th Cir. 1977) 25

United States v. Nixon, 418 U.S. 683 (1974). 15

United States v. Oaks, 527 F.2d 937 (9th Cir. 1975), cert. denied 426 U.S. 952 (1976) 24

Page

United States v. Peskin,
527 F.2d 71 (7th Cir. 1975),
cert. denied, 429 U.S. 818
(1976). 24

Walker v. Cahalan,
542 F.2d 681 (6th Cir. 1976),
cert. denied, 430 U.S. 966
(1977). 17

Wood v. Strickland,
420 U.S. 308 (1975) 18

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 26, 38

State Cases

Brown v. Stookey,
134 Colo. 11, 298 F.2d 955
(1956). 32

Espinoza v. O'Dell,
633 P.2d 455 (Colo. 1981) . . 32, 34, 35,
36

exists that the accused is in fact a murderer.

OPINION BELOW

The Judgement and Opinion of the United States Court of Appeals for the Tenth Circuit is found in Appendix A hereto, infra, page 1. The Order of Dismissal of the Unites States District Court for the District of Colorado is found in Appendix B hereto, page 1.

JURISDICTION

The judgement of the United States Court of Appeals for the Tenth Circuit was entered on February 16, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTION, TREATIES AND STATUTES

This case involves Article VI, clauses 2 and 3 of the Constitution of the United States of America. Said clauses read in relevant part as follows:

"This Constitution, and the laws of the United States which shall be made in Pursuance

thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution. . ."

This case also involves United States Treaty 20.3.2804 TIAS 6749. Article IX of said treaty reads as follows:

"Each Government shall use its best efforts to extend to citizens of the other country engaged in activities pursuant to this agreement such favorable treatment with respect to entry, travel, duty free entry of

personal effects, residence and exit as is consonant with its national laws and regulations."

STATEMENT OF THE CASE

Pursuant to Public Law 80-497, approved July 8, 1966 (80 Stat. 271; 1 U.S.C. 113), the United States of America and Saudi Arabia entered into a bilateral treaty, to wit, "Agreement For Cultural Exchange Between The United States and Saudi Arabia. U.S.T. 20.3.2804 TIAS 6749. ("the Agreement"). The said international agreement was signed at Jidda, Saudi Arabia on July 25, 1968 and entered into force on July 25, 1968. Under Article II of the Agreement, the two governments shall promote and faciliate the interchange . . . of prominent citizens, professors, teachers, technicians, students. . . etc. More specifically Article IX of the Agreement provides as follows:

"Each Government shall use its best efforts to extend to citizens of the other country engaged in activities pursuant to this agreement such favorable treatment with respect to entry, travel, duty-free entry

of personal effects, residence and exit as is consonant with its national laws and regulations."

Pursuant to the above international treaty, Petitioner's son, Saud Dohaish entered into the United States on a Saudi government scholarship. Furthermore, Saud Dohaish's entry and presence in the United States was sponsored through the Saudi Arabian Educational Mission to the United States, whose director is the Saudi Arabian Educational Attache to the United States.

In October 1977, Saud Dohaish entered into the United States where he was admitted to the Bridge International School of Colorado Women's College, Denver, Colorado, to study the English language.

As part of his studies, Saud Dohaish, as well as other foreign students needing competence in the English language, were encouraged to speak with native Americans to enhance their spoken English.

On the night of July 28, 1978, Saud Dohaish and a few of his Saudi friends were invited to another Saudi student's house for dinner. However, because there was not enough food for everyone, Saud Dohaish and three (3) of his friends travelled to a nearby McDonald's for hamburgers. After eating, Saud Dohaish and his friends went to play pocket billiards ("pool"), a favorite Saudi game, at a local establishment, Caesar's Nite Club. Saud Dohaish was a good billiards player and beat a number of people at the establishment. While Saud Dohaish's friends meandered to another part of the establishment, apparently Saud and a man by the name of Eddie Santistevan played or were playing a game. Saud Dohaish was struck in the forehead with a sharp object at approximately 1:30 A.M., July 29, 1978.

At approximately 3:30 A.M. on July 29, Detective John L. Weber of the Denver Police Department assigned to the Homicide Bureau,

went to the hospital on a report of an assault. Officer M.S. Newell reported to Detective Weber that upon arrival at the hospital, Saud Dohaish was unconscious and was listed as critical with a severe blow to the head. Detective Weber then met with one of Saud Dohaish's friends, Yousif Barrak, who was present at Caesar's. Mr. Barrak, who spoke very little English, told Weber that Saud told him that a man had hit him with a pool cue because he had won a pool game.

Later on the morning of July 29, 1978, Detective Rudolf Sandoval of the Denver Police Assault Detail was assigned to the case.

Saud Dohaish expired at Mercy Hospital on August 7, 1978, never having regained consciousness. Dr. William Warmath had diagnosed Saud's injury as an acute subdural hematoma leaving one small cortical type of tear anteriorly over the temporal tip of Saud's brain. Dr. Warmath was willing to testify to the cause of death being a

massive acute subdural hematoma.

On August 8, 1978, Detective Weber was reassigned to the homicide of Saud A. Dohaish. That day, Detective Weber drove to Caesar's, 100 Santa Fe Drive, and interviewed the owner/manager Albert Maestas. Mr. Maestas informed Detective Weber that he and his wife, Gloria Maestas, were sitting at the bar near the pool table. Mr. Maestas told Weber that Saud Dohaish was playing pool with an unknown customer he described as a Spanish-American male, 22 or 23 years of age, 5'9" tall, 145 pounds, light brown hair, medium length, wearing blue jeans, a white T-shirt and tennis shoes. Oddly, Mr. Maestas represented to Detective Weber that the suspect was not an illegal alien. Maestas said that after a game between the men, Santistevan was walking away from the table when Saud either pushed or grabbed the suspect's shirt. At this point Maestas related Santistevan struck Saud on the head with the tip of a pool cue. Saud,

Maestas related, had a pool cue in one hand and a pool ball in the other at the time he was struck. After being struck, Maestas said Saud threw the ball to the floor and left the establishment with his three (3) friends. After Saud was struck, Maestas said that he attempted to aid the victim by securing a bar towel to stop the bleeding. Maestas said he then notified the Denver police and went outside with Saud. Santistevan and a friend of his ran out of the bar prior to the arrival of the police at approximately 12:15 A.M. Maestas stated that the lounge was very quiet that night and that a bartender by the name of George Sandoval was present at the time of the assault. He then stated he would give the police Sandoval's address and telephone number when secured.

Later, the evening of August 8, Detectives Morgan and Crutchley of the Crime Laboratory, returned to Caesar's and photographed the interior and exterior.

The next day, Detective Weber travelled to the home of Mr. and Mrs. Maestas. Mr. Maestas admitted that he had not been candid during their interview the previous day. Mr. Maestas said that he knew the suspect by name as the suspect had been a former employee of his. He then identified the suspect as Eddie Santistevan and reported his address. Mr. Maestas stated he was reluctant to become involved in the case because he feared for the safety of his wife, business and himself. Maestas told Detective Weber that the victim's death had been seiously bothering him and that he did see the suspect strike Saud on the forehead with a pool cue. Mr. Maestas said that when the blow was struck the cue broke in half. Mrs. Maestas, on the other hand, said that she was in the office behind the bar when she heard a loud noise. When she came out, she saw the victim bleeding and Eddie standing near the pool table with a broken pool cue in his hand.

On August 10, 1978, County Court Judge George Manerburg (sic?) issued an arrest warrant for Eddie W. Santistevan. Detective Weber arrested Santistevan at the suspect's home and transported him to the Homicide Bureau where he was advised of his constitutional rights. Santistevan first declined to make a statement concerning the incident. While Detective Weber was writing the arrest slip, Santistevan began making voluntary statements about the assault. Santistevan stated twice, "it was self defense." Detective Weber asked Santistevan if he now wanted to make a statement about the incident. Santistevan replied that he did, before being advised of his rights again. Santistevan made a written statement in which he stated that he struck the victim with a pool cue after the victim lunged at him. Santistevan was thereafter placed in Denver City Jail.

On August 11, 1978, the Denver Police Department presented the case to the office of

the District Attorney for the filing of criminal charges. The first degree murder charge was reduced to a second degree charge shortly thereafter.

It was during the middle part of August, 1978, that Petitioner Abdullah Dohaish learned of his son's death. The Saudi Arabian Educational Mission to the United States ("the Mission"), located in Houston, Texas, inquired into the circumstances of the death of one of its students and the legal processes concerning the accused murderer. Special attention by the Mission was directed to hearing dates and trial settings. Numerous requests were made on behalf of the Mission to the District Attorney's office to be made aware of trial dates and settings so that a representative from the Mission could observe the proceedings.

On October 16, 1978, in Criminal Action No. 131711-16, styled the People of the State of Colorado, Plaintiff, v. Eddie Santistevan, Defendant, a preliminary hearing was held

in the County Court in and for the City and County of Denver, State of Colorado. Judge George A. Manerbino presided. Although there were at least eight (8) witnesses who were present in the night club the night of the incident and who could have been called as witnesses, the prosecutor chose only the night club owner, who took the 5th Amendment when questioned about his relationship with Santistevan, and the owner's wife. After holding the case bound over for trial, however, the Denver District Attorney's office moved to dismiss the charges against Santistevan. Consequently, Judge Manerbino dismissed the second degree murder charge against Santistevan.

On February 21, 1979, the Saudi Arabian Educational Attache to the United States learned of the actions of the District Attorney's Office in dismissing the charges against Santistevan. Shortly thereafter, the Saudi Attache directed a letter to

Respondent Dale Tooley requesting a reconsideration of the dismissal of charges. (Appendix C, attached). On March 12, 1979, however, Respondent Tooley directed a reply letter to the Saudi Attache wherein he misstated the law with respect to preliminary hearings and the facts that were available to him. (Appendix D, attached). Respondent declined to reopen the case and stated that "justice would not be served by the further prosecution of Mr. Santistevan."

After conversations with Respondent's office by Petitioner by and through his attorney and after an investigation of the facts and circumstances of the incident, Petitioner filed his complaint in the United States District Court of Colorado on February 23, 1981. In said complaint Petitioner alleged the instant action arose under the United States Constitution, particularly under the provisions of the Fourteenth Amendment and under the laws of the United States,

particularly under Title 42 of the United States Code, Sections 1981, 1983, 1988 2201 and 2202. Petitioner alleged Respondent had abused his discretion in not prosecuting the killer of his son and requested injuctive relief, declaratory relief and damages (nominal and punitive) among other things.

On February 25, 1981, Petitioner filed his Amended Complaint with a copy of the statement of facts of the preliminary hearing that took place on October 16, 1978, in the County Court in and for the City and County of Denver, State of Colorado, entitled The People of the State of Colorado v. Eddie W. Santistevan, Crim. Action No. 131711-16.

On March 17, 1981, Respondent filed his Motion to Dismiss alleging absolute immunity under the doctrine in Imbler v. Pachtman, 424 U.S. 409 (1976).

On March 18, 1981, all parties were notified by the District Clerk that a hearing on the Motion to Dismiss was set at 8:15 A.M.

on April 15, 1981.

The District Court dismissed Petitioner's complaint on April 15, and on May 14, 1981, Petitioner filed his notice of appeal.

On June 8, 1981, Petitioner filed his docketing statement with the Clerk of the Court of Appeals.

On June 30, 1981, the Clerk of the Court of Appeals granted Petitioner an extension of time to file his brief up to and including July 24, 1981. On or about July 24, 1981, Petitioner filed his brief with the Clerk of the Court of Appeals.

On July 30, the Clerk granted Respondent an extension of time to file his brief up to and including August 28, 1981. On or about August 28, 1981, Respondent filed his Answer Brief with the Court of Appeals.

Petitioner filed his Reply Brief with the Court of Appeals on September 14, 1981.

On Tuesday, February 2, 1982, the Court of Appeals heard oral argument at Special

Session in Denver, Colorado. During oral argument, an order was entered directing Appellant Dohaish "to file supplemental authorities within five days; appellee to respond within ten days." Judges Barrett, Doyle and Logan made up the panel. Petitioner filed Supplemental Brief of Appellant on February 8, 1982. The Court of Appeals for the Tenth Circuit affirmed the decision of the lower court on February 16, 1982.

REASONS FOR GRANTING THE WRIT

I

A state prosecutor should not be a "court of last resort" when exercising his prosecutorial discretion in not prosecuting an accused murderer where evidence of probable cause is available or has been established at a preliminary hearing.

A. The Role of the Judiciary Under the Constitution.

Adhering to constitutional principles is, of course, not the sole province of the

judiciary. In our tripartite system, the three branches are coequal, and the Constitution is superior to each branch. The supremacy of the Constitution, the supremacy of the "consent of the governed," requires that each branch adhere to constitutional principles in the exercise of its powers. Ideally, constitutionally, the judiciary measures the other branches' adherence to constitutional principles only secondarily, after the primary measure of adherence has been taken by the coequal branch itself. Thus, the prosecutor's decision to prosecute must always be made with constitutional limits on discretion in mind. Then, the judiciary performs the very limited role of secondarily measuring the primary decision of the prosecutor against constitutional standards.

In United States v. Nixon, 418 U.S. 683 (1974), Chief Justice Burger writing for an

unanimous Court, summarized this basic aspect of our tripartite form of government. In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. Id. at 703. However, in the historical land mark decision of Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803), the Supreme Court, hold that it is emphatically the province and duty of the judicial department to say what the law is. Id., at 177. See also U.S.C.A. Const. art. 6, cl. 2. It is clear then that a prosecutor's discretion must be reviewable by the judiciary.

B. The Law Regarding Immunity of Prosecuting Attorneys.

1. Imbler v. Pachtman

In Imbler v. Pachtman, 424 U.S. 409 (1976) the Supreme Court held that a prosecutor is absolutely immune from suit for

malicious prosecution under 42 U.S.C. Section 1983 as he enjoyed at common law. Id., at 424-431. However, absolute immunity does not generally bar federal injunctive and declaratory relief. Mitchum v. Foster, 407 U.S. 255 (1972).

Although the Supreme Court did not directly address the issue, it did recognize lower federal court decisions that had denied absolute immunity to prosecutors engaged in investigative or administrative activities. Imbler v. Pachtman, supra, at 430-431. Based on these lower court decisions, when the conduct of a prosecutor falls into one of these categories, it is deemed beyond the scope of his quasi-judicial authority and he, then, is entitled only to the qualified immunity afforded other governmental officials. Jacobson v. Rose, 592 F.2d 515 (9th Cir. 1978), cert. denied, 442 U.S. 930 (1979); and Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976), cert. denied, 430

U.S. 966 (1977). Qualified immunity places the burden on the official to defend his actions, and to avoid liability, the prosecutor must establish his good faith and the reasonableness of his behavior in light of the circumstances. Imbler v. Pachtman, supra, at 419 n. 13 (citing Scheuer v. Rhodes, 416 U.S. 232, 238-239 (1974) and Wood v. Strickland, 420 U.S. 308, 320-322 (1975)).

In determining whether the same considerations of public policy that underlie the common law rule likewise countenance absolute immunity under Section 1983 and the facts in Imbler, the court found that they did. Imbler v. Pachtman, supra, at 424. There are at least three reasons that underlie the Supreme Court's finding of a heightened danger of influence on the exercise of prosecutorial discretion. Id., at 418-419, 424-427. First, since a prosecutor is more likely to be sued when he decides to prosecute, the desire to avoid

liability would always slant a prosecutor's conduct toward fewer prosecutions, which clashes with the prosecutor's public duty to enforce the law vigorously. Id, at 424-428.

Secondly, since prosecutors are faced with an identifiable potential plaintiff each time they decide to prosecute an individual, such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Id, at 425. Thus, damage claims against prosecutors may drain a disproportionately large amount of prosecutorial time. Id, at 425, 426.

Thirdly, and most importantly, since various post-trial procedures are available to determine whether an accused has received a fair trial, the ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to liability under Section 1983. Id, at 427. The

remedial powers of the trial judge, appellate review and state and federal post-conviction collateral remedies are some such available post-trial procedures. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. Id. The Supreme Court went on to hold that such a focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might, result in the prosecutor's being called upon to respond in damages for his error or mistaken judgement. Id.

2. Butz v. Economou.

A more recent Supreme Court decision that analyzes the factors relevant to immunity determinations is Butz v. Economou, 438 U.S. 478 (1978). The value of Butz with respect to the instant appeal lies in its clarification of the considerations upon which Imbler relied. Although Butz

concerned Department of Agriculture officials who had conducted an administrative hearing, since such officials exercised discretion similar to that of judicial officers, the Supreme Court held them to be absolutely immune. Butz v. Economou, supra, at 511-517.

Three major factors are to be balanced when deciding whether an official is entitled to absolute or qualified immunity. First, the prosecutorial discretion must be related to adjudicatory proceedings, i.e., activities which are intimately associated with the judicial phase of the criminal process. Id, at 511. Second, the grant of absolute immunity is only warranted when it is likely that, in its absence, the prosecutor will be the target of retaliatory suits. Id, at 512. The Court found that the loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. Id. Finally, the Supreme

Court recognized that safeguards must be available to deter the prosecutor from misusing his authority. Id. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process and the correctability of error on appeal are just a few of the many checks on malicious action by prosecutors in their quasi-judicial role. Id. In fact, the Court focused on the challenges to the prosecutor's assertions by defense counsel through cross-examination and rebuttal, the scrutiny of his decision to commence the action during the trial proceeding itself, and the jury's decision whether to accept the credibility of any evidence presented for its deliberation. Id, at 516-517.

Thus, the focus on the availability of checks as outlined in Butz v. Economou indicates that the broad implications of

Imbler v. Pachtman are subject to limitation. For example, a murderer should not be allowed to go free solely on the caprice of a state prosecutor.

II.

A state prosecutor may not, when exercising his discretion, base his decision not to prosecute an accused murderer on suspect criteria such as race, religion, nationality or national origin.

In United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978), the Court of Appeals held that it was proper to deny a prosecutor's motion to dismiss when his exercise of prosecutorial discretion is so abusive as to encroach on constitutionally protected rights since the judiciary must protect against unconstitutional deprivations. Id, at 1307. In United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974), the leading case on selective prosecution, the Court of Appeals held that to support a defense of selective prosecution, a defendant bears a

heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the discriminatory selection of him has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. Id, at 1211. See United States v. Johnson, supra, and United States v. Bennett, 539 F.2d 45, 54 (10th Cir.), cert. denied, 429 U.S. 925 (1976); United States v. Dog Crow, 532 F.2d 1182, 1196 (8th Cir. 1976), cert. denied 97 S.Ct. 1547 (1977); United States v. Bourque, 541 F.2d 290, 292-293 (1st Cir. 1976); United States v. Oaks, 527 F.2d 937, 940 (9th Cir. 1975), cert. denied, 426, U.S. 952 (1976); United States v. Peskin, 527 F.2d 71, 86 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); and United States v.

Berrigan, 482 F.2d 171, 176-182 (3rd Cir. 1973).

In United States v. Kelley, 556 F.2d 257 (5th Cir. 1977) the Court of Appeals held that a defendant in setting forth a defense of selective or discriminatory prosecution must be allowed to demonstrate that his complaint might have merit, i.e. establishing, at least prima facie, the first prong of the rule laid down in United States v. Berrios, supra. Id, at 265. Petitioner believes he is at least entitled to the same opportunity, i.e. a chance to show that because of the nationality of his son, Respondent failed to prosecute his son's murderer.

III

A father has standing to bring an action under the Constitution and Civil Rights statutes against a state prosecutor who intentionally fails to prosecute the accused murderer of his son because of criteria such as the race, religion or

national origin of the father and son and where probable cause exists that the accused is in fact a murderer.

In Butz v. Economou, 438 U.S. 478 (1978), the Supreme Court held that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal question jurisdiction of the district courts to obtain an award of monetary damages against the responsible state official. Id, at 504. The Fourteenth Amendment forbids state officials from denying equal protection of the laws. State action which is nondiscriminary by its terms may constitute a de jure violation of equal protection if it is intentionally or purposefully applied in a discriminatory fashion. See Yick Wo. v. Hopkins, 118 U.S. 356 (1886). To withstand scrutiny under the equal protection clause, Classifications based upon race, religion, national origin or alienage must serve compelling

state interests. Thus, the equal protection clause confers on Petitioner Abdullah Dohaish and his deceased son, Saud Dohaish, a federal constitutional right to be free from discrimination based upon race, religion, national origin and alienage which cannot meet these requirements. It is true that statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner. The Constitution, on the other hand, does not partake of the prolixity of a legal code. See McCulloch v. Maryland, 4 Wheat 316, 407, 4 L.Ed. 579 (1819).

In Davis v. Passman, 442 U.S. 228 (1978), the Supreme Court held that in the absence of a textually demonstrable constitutional commitment of an issue to a coordinate political department, it is presumed that justiciable constitutional rights are to be

enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights. Id, at 242.

It is established practice for the Supreme Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the Fourteenth Amendment forbids the state to do. Bell v. Hood, 327 U.S. 678, 684 (1946). In appropriate circumstances, a federal district court may provide relief in damages for the violation of constitutional rights if there are no special factors counselling hesitation

in the absence of affirmative action by Congress. See Butz v. Economou, supra, at 504.

Petitioner Abdullah Dohaish clearly rests his claim directly on the Equal Protection Clause of the Fourteenth Amendment. Abdullah Dohaish claims that his rights and the rights of his son have been violated and that he has no effective means other than the judiciary to vindicate these rights. Clearly, Abdullah Dohaish is an appropriate party to invoke the jurisdiction of the district court to seek relief and has a cause of action under the Fourteenth Amendment.

A. 42 U.S.C. Section 1988.

In Robertson v. Wegman, 436 U.S. 584, the Supreme Court held that the decision as to the applicable survivorship is governed by 42 U.S.C. Section 1988. Section 1988 recognizes that in certain areas federal law

is unsuited or insufficient to furnish suitable remedies and does not cover every issue that may arise in the context of a federal civil rights action. Moor v. County of Alameda, 411 US 693, (1973). One specific area not covered by federal law is that relating to the survival of civil rights actions under Section 1983 upon death. Id, at 702 n. 14.

When federal law is thus deficient, Section 1988 instructs to turn to the common law, as modified by the Constitution and statutes of the forum state, as long as these are not inconsistent with the Constitution and laws of the United States. Robertson v. Wegman, supra., at 588. Regardless of the source of the law applied in a particular case, however, it is clear that the ultimate rule adopted under Section 1988 is a federal rule responsive to the need whenever a federal right is impaired. Moor v. County of Alameda, supra., at 703,

quoting Sullivan v. Little Hunting Park, Inc., 396 US 229, 240 (1969).

In resolving questions of inconsistency between the state and federal law raised under Section 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at the policies expressed in them. Sullivan v. Little Hunting Park, Inc., supra, at 240. Of particular importance is whether application of state law would be inconsistent with the federal policy underlying the cause of action under consideration. Johnson v. Railway Express Agency, Inc., 421 US 454, 465 (1975).

The policies underlying Section 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power, by those acting under color of state law. Carey v. Piphus, 435 US 247, 254 (1978); Mitchum v. Foster, 407

US 225, 238-242 (1972); and Monroe v. Pape, 365 US 167, 172-187 (1961).

The applicable Colorado survivorship statute, Section 13-20-101(1), C.R.S. 1973, provides, in relevant part, as follows: "All causes of action . . . shall survive . . . the death of the person in favor of whom . . . such action has accrued . . ." . Suit is brought in spite of the injured party's death to prevent certain actions or causes of action already accrued from abating by reason of the death of either of the parties. Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981); Brown v. Stookey, 134 Colo. 11, 14, 298 P.2d 955, 957 (1956).

It is, therefore, clear that under the facts of the instant appeal, the Colorado survivorship statute is inconsistent with the underlying policies of Section 1983. Unlike the facts under Robertson v. Wegman, supra., where the decedent left no "close relatives" and where suit was continued by

the deceased's personal representative, Saud Dohaish is survived by close relatives, including his father. Although the goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate, Id, at 592, the basis is provided if the father sues on behalf of his son. Id. As to the Section 1983 goal of preventing official illegality, since causes of actions accruing after the death of the injured party do not survive in Colorado other than those for wrongful death, the victims in all homicide cases could not bring suit for the acts complained of in the instant appeal, although non-homicide victims could. A state prosecutor would be absolutely free not to prosecute an accused in homicide cases, the most heinous variety, but would be compelled to recognize constitutional standards in deciding not to prosecute

an accused in non-homicide cases. This conclusion would be absurd on its face.

Since the Colorado law survives under the facts of the instant appeal only for the deceased's personal representative, only for actions occuring before the death of the injured party (deceased), Espinoza v. O'Dell, supra., at 466, it is clear that in a significant number of cases, i.e., all homicide offenses, the underlying policies of Section 1983 would be adversely affected. As the father, heir and personal representative of the late Saud Dohaish, it is clear that Petitioner has standing to sue Dale Tooley both in the capacity of heir and executor.

B. Fourteenth Amendment

In Stanley v. Illinois, 405 US 645 (1972) the Supreme Court held that the private interest of a father in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing

interest, protection from illegal state action. Id, at 650, 651. The due process clause of the 14th Amendment extends constitutional protections to the relationship between a father and his children. Id.

In Colorado, the heirs of the deceased have been denied the right to assert claims for damages under Section 13-20-101(1) 1973. See Espinoza v. O'Dell, supra., at 466. It would therefore appear that there is a violation of equal protection to deny fathers the right to bring such an action, where they have a private constitutionally protected fundamental liberty interest in their children, but to permit the personal representative to bring such an action on behalf of the deceased child. In other words, if a father has a private interest in the companionship, care, custody and management of his children separate and apart from the child's interest in himself while alive, the father should

also have a private interest separate and apart from that of the personal representative of his deceased child's estate, who, in Colorado, stands in the decedent's shoes in a state survival action. See, Espinoza v. O'Dell, supra., at 466; Publix Cab Co. v. Colorado National Bank, 139 Colo. 205, 338 P.2d 702 (1959) re the role of a deceased's personal representative.

Therefore, Abdullah Dohaish should have standing to sue both as the father and heir of Saud Dohaish as well as the executor of his son's estate.

CONCLUSION

It is clear that under the Constitution the judicial department is given the task of measuring the executive and legislative branches' adherence to constitutional standards. When a state prosecutor exercises his prosecutorial discretion by affirmatively prosecuting a defendant, the judicial department is and will be actively involved in

reviewing the constitutionality of such discretion. The remedial powers of the trial judge, and jury, appellate review and state and federal post conviction collateral remedies are available among others. However, the above checks are not available to review or correct a constitutionally infirm decision of a district attorney not to prosecute a defendant. Consequently, if there be no judicial review available, in such circumstances, the prosecutor will be the sole and final arbiter of whether the guilty are to be punished. The quasi-judicial role of the prosecutor was never intended to be an exception to the rule laid down as far back as Marbury v. Madison, supra. The judiciary itself must have the final word on stating what the law is.

Nearly a century ago the Supreme Court concluded that the administration of laws with an evil eye and an unequal hand, so as to

practically make unjust and illegal discrimination between persons in similar circumstances constituted a denial of equal protection of the laws. Yick Wo. v. Hopkins, 118 U.S. 356, 373-374 (1886).

Petitioner has alleged an abuse of discretion by Respondent in dismissing charges against the accused murderer of his son. Petitioner's allegation is based on the fact that he and his deceased son are Saudi nationals and that, because of their nationality, the law has not been applied equally by Respondent. The killer of Petitioner's son was arrested because the police officer involved had probable cause that a criminal offense had been committed and that the killer was the perpetrator of the crime. A preliminary hearing was conducted in the state court, and that tribunal had found probable cause to take the case to trial. However, upon Respondent's action, the charges were dismissed against the killer before he could be tried.

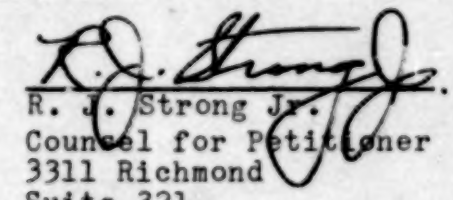
But for the fact that Petitioner and his son were Saudi nationals, Respondent would have vigorously prosecuted this case as was his duty.

The doctrine of Imbler v. Pachtman comes into play only when a prosecutor decides to prosecute because of the safeguards outlined in the argument.

In short, Petitioner has alleged invidious discrimination on the part of Respondent in choosing to dismiss the charges against the admitted killer of Saud Dohaish. Petitioner therefore requests that he be given the opportunity to show that in similar situations, Respondent has vigorously prosecuted defendants such as the killer of Saud Dohaish and has not sought to dismiss the charges against such defendants when probable cause at a preliminary hearing had been established. Petitioner is clearly able to prove a set of facts in support of his claim which would entitle him to

relief. For these reasons Petitioner respectfully requests that this court find that the judgements of the lower courts be reversed and this case be remanded for an evidentiary hearing.

Respectfully submitted,



R. J. Strong Jr.
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713/529-4868

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, Abdullah Dohaish, hereby certifies that on the 14 th day of May, 1982, three (3) copies of Petitioner's Petition for Writ of Certiorari were served upon counsel for Respondent, Patricia M. Ayd, by mailing the same to her at her address 1660 Lincoln Center Building, 1660 Lincoln Street, Denver, Colorado 80264.

R. J. Strong Jr.

R. J. Strong Jr.
COUNSEL FOR PETITIONER

UNITED STATES COURT OF APPEALS

For the Tenth Circuit

Slip Opinion

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ABDULLAH DOHAISH, Plaintiff-Appellant,	)	
v.	)	No. 81-1607
DALE TOOLEY, Defendant-Appellee.	)	

Appeal from the United States District Court for the District of Colorado (D.C. No. 81-K-215)

R. J. Strong Jr., Houston, Texas, (John E. Mosby, Denver, Colorado, with him on the brief) for Plaintiff-Appellant.

Patricia M. Ayd, White and Steels, Denver, Colorado, for Defendant-Appellee.

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before BARRETT, DOYLE and LOGAN, Circuit Judges.

DOYLE, Circuit Judge.

The appellant herein seeks reversal of a judgment of the District Court for the District of Colorado which dismissed an action which sought to compel the State District Attorney, Dale Tooley, to prosecute a man who allegedly killed appellant Dohaish's son. The district court dismissed the action against Tooley, finding that Dohaish lacked standing and secondly, that Tooley, as the prosecuting attorney in the case, was immune to suit.

The facts are these. Saud Dohaish, a Saudi Arabian student, was admitted to the United States in 1977 for the purpose of studying English at Colorado Women's College. On the night of July 28, 1978, Dohaish and several friends went to Caesar's Nite Club, a Denver bar, to play billiards. Dohaish played pool with other club patrons after his friends wandered to another part of the area. During a game with a man named Eddie Santistevan some difference

arose. In the course of this Santistevan struck Dohaish on the forehead with a pool cue. Dohaish was taken to the hospital and became unconscious. He died about one week later on August 7, 1978. Following a police investigation Santistevan was arrested and was charged with first degree murder, which charge was later reduced to second degree. In a statement to police about the incident Santistevan alleged that he had acted in self defense. He struck Dohaish, he said, only after Dohaish lunged at him.

On October 16, 1978, a preliminary hearing was held in the County Court in and for the City and County of Denver, Chief Judge George Manerbino was presiding. Both the prosecution and the defense extensively examined the witnesses. After the hearing, Judge Manerbino bound the case over for trial. Immediately thereafter, prosecutor Lawrence Orr moved to dismiss the charge

against Santistevan. Judge Manerbino, in accordance with that motion, dismissed the action. The prosecutor gave no particular reason for the action that was taken. However, in an exchange of letters between the Saudi Arabian Educational Attache and District Attorney Tooley, the latter stated that the prosecution's election to dismiss grew out of the difficulty of negating Santistevan's self defense claim.

In any event the father of Saud Dohaish, Abdullah Dohaish, sued in federal district court alleging that the district attorney's refusal to prosecute stemmed from prejudice against Saudi Arabians and violated the Fourteenth Amendment as well as provisions of the Civil Rights Act, 42 U.S.C. Section 1981, et seq. Damages were requested and injunctive relief as well. In response to this, District Attorney Tooley filed a motion to dismiss, urging that prosecutors were immune from suit for actions performed

within the scope of prosecutorial duties. Following a hearing on the motion, the district court dismissed the action, noting that Dohaish lacked standing to bring suit and that Tooley was immune from such an action. We are called upon to review this determination.

The theory of Appellant Abdullah Dohaish is that no standing problem exists. He maintains that he is the appropriate party to enforce in court protections from discrimination based upon race, religion, national origin or alienage; to uphold rights which are conferred on both himself and his son by the Constitution. He thus contends that the district attorney's finding that he lacked standing was itself unfounded.

The major obstacle to the Dohaish action, however, is the weaknesses in the suit itself. It is this deficiency which persuades us. It is quite true that there

is also a lack of standing. When we say standing, we mean that the Section 1983 civil rights action is a personal suit. It does not accrue to a relative, even the father of the deceased. (Note: It can descend to a relative under appropriate circumstances.) Because the discrimination which is alleged does not extend to the father, the father cannot bring the suit on such a basis in the federal court, or in the state court either, for that matter. In other words, the plaintiff Abdullah Dohaish has not suffered a violation of his civil rights whatsoever. We need not consider the legal effect where invasion of civil rights occurs prior to death, a condition which is not present here.

It is not unusual for standing and the cause of action based on violation of civil rights to be confused. See Wright

& Miller & Cooper, 13 Federal Practice and Procedure, Section 3531, at pp. 67-69 (Supp.) (1980). Both the question of standing and the question of legal sufficiency of the action focus on the nature of the plaintiff's injury and the nature of the invasion of his alleged right but different considerations underlie the two concepts.

An effort was made to clarify the distinction between standing and cause of action in Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264 (1979). "Cause of action," the Court noted, is used "to refer roughly to the alleged invasion of 'recognized legal rights' upon which a plaintiff bases his claim for relief." Id. at 2274 n. 18. Thus the existence of a plaintiff's cause of action is a question whether he is a member of a class of litigants that may, as a matter of law, appropriately invoke the jurisdiction of the court. Id, at 2274 n.

18. In contrast to the "cause of action" inquiry on the nature of the right asserted, the "standing" inquiry is a subsequent evaluation of the nature or extent of the plaintiff's injury -- his stake in the action. Thus, a plaintiff's standing is a question of whether he is "sufficiently adversary to a defendant to create an Article III (of the Constitution) case or controversy, or at least to overcome limitations on federal court jurisdiction." See also the opinion of the Supreme Court in Warth v. Seldin, 422 U.S. 490, 498 (1975).

The problem, then, is the inability of Abdullah Dohaish to show that any recognized legally valid right, or even privilege, was violated by the district attorney's refusal to prosecute Santistevan. To be sure, as a practical matter, a father is closely related to the son and, thus, he feels the injury to a tremendous extent when his son suffers death. However, he does not have

a civil right to pursue such an action.

The ordinary citizen does not have a general interest justifying a lawsuit based on the criminal prosecution or non-prosecution of another. Linda S. v. Richard D., 410 U.S. 614, 619 (1973). Such a right is not recognized in the law and, indeed, it would be contrary to public policy to allow every private citizen to force the prosecutor to proceed with a case in pursuit of a private objective. The district attorney is sworn to uphold the law generally and does not have a duty to enforce the law for the purpose of providing satisfaction to a third person who has no direct legal interest.

Even if such actions were permitted, only the victim would have the required legal standing to bring such an action. See Warth v. Seldin, 422 U.S. 490, 498-99 (1975). The plaintiff himself must have suffered harm. Cf. Sanchez v. Marquez,

457 F. Supp. 359, 362-63 (D. Colo. 1978). Sanchez held that brothers and sisters of decedent could not claim that their constitutional rights were violated by the death. It is further elaborated in Sanchez that the brother and sister would have been limited to an action to redress violations of the victim's own rights.

This does not mean that an action on behalf of the victim to vindicate his alleged right to prosecute could be brought, for this would be barred by state survival statutes. The Colorado Survival Statute C.R.S. Section 13-20-101 (1973) provides for the survival of most actions that have "accrued" prior to death. Here no action accrued during the lifetime of the decedent; it could have accrued only when the district attorney dismissed the charge and this was long after the death in this very sad case.

At best, relief in this kind of situation would be highly uncertain. Even if he

prevailed in this action, appellant would have no guarantee about the effectiveness of granting the requested relief; that there would be a conviction in the subsequent criminal case. See, e.g., Warth v. Seldin, supra, at 503-05.

We are not saying that there are no possible remedies available. Appellant Dohaish was at liberty to pursue remedies other than this action against the district attorney. A Colorado statute would have allowed Dohaish to file an action requesting the state judge to compel the prosecuting attorney to show good cause for dismissing the charge against the suspect. C.R.S. 16-5-209 (1973). The purpose of that statute is to allow persons who believe that a prosecuting attorney is not pursuing a case with diligence to petition the court to review the status of the case. Should the court be dissatisfied with the prosecutor's response to the show cause

order, direction can be given to the prosecuting attorney to file the charges and even to appoint a special prosecutor to handle the case. Id.

Still another remedy which would have been available to Dohaish would have been to file a wrongful death suit against the assailant. C.R.S. 13-21-202 (1973). However, the case that is presented is, for the reasons that we have already mentioned, lacking in the prerequisites of a legal cause.

We have not mentioned the important factor that Tooley enjoys an absolute immunity from suit. This is for the purpose of guaranteeing to him unlimited independence in the discharge of his duties. See Imbler v. Pachtman, 424 U.S. 409 (1976). That case conclusively established that prosecutors are not required to submit to civil actions questioning their judgment in their performance of "quasi-judicial"

duties. The quasi-judicial duties of a prosecutor include conduct involved in initiating a prosecution and presenting the state's case. A decision not to prosecute is a decision which is protected by that immunity. See, e.g., Maynard v. Kear, 474 F. Supp. 794, 798 (n.D. Ohio 1979) (prosecutor there acted within the scope of his duties in deciding not to charge suspects with a crime; such discretionary acts are protected by absolute immunity); Tyler v. Ryan, 419 F. Supp. 905, 907 (E.D. Mo. 1976) (failure to prosecute is an act within the scope of prosecutorial duties and is protected by immunity); cf. Van Meveren v. District Court of Larimar County, 186 Colo. 335, 527 P.2d 50, 52 (1974) (prosecutor's decision to move for the dismissal of a criminal charge is a matter of discretion; the courts are not allowed to interfere with such decisions). It is similar to a decision to prosecute,

and is shielded for the same reasons. Imbler v. Pachtman, supra, at 424-25; Yaselli v. Goff, 275 U.S. 502 (1927).

Finally, there is not the slightest indication of either bias or discrimination.

The decision of the district court to dismiss the action is affirmed.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

ABDULLAH DOHAISH, Plaintiff	X	
	X	
	X	
v.	X	CIVIL ACTION NO.
	X	81-K-215
DALE TOOLEY, Defendant	X	
	X	ORDER OF DISMISSAL

This matter having come before the court on defendant's Motion to Dismiss and the court having heard arguments of counsel and having made findings of fact and conclusions of law, included herein by reference, granting the motion, it is hereby.

ORDERED that this civil action and complaint are dismissed.

DATED at Denver, Colorado this 15th day of April, 1981.

United States District Judge

Saudi Arabian Educational
Mission to the United
States
2223 West Loop South -
Suite 400
Houston, Texas 77027
(713)629-5170
Telex: 77 5977

21 February, 1979

Hon. Dale Tooley
District Attorney
Second Judicial District
924 West Colfax
Denver, Colorado 80204

Re: People v. Eddie Santistevan
Criminal Action 131711

Dear Mr. Tooley:

This letter is to request that your office re-open the case People v. Eddie Santistevan Criminal Action 131711 and prosecute Mr. Santistevan vigorously.

As you may know, Mr. Santistevan was charged with the murder of Saud Dohaish. Mr. Santistevan admitted the act, but claimed he was acting in self defense. The case was developed through the preliminary stages, but suddenly dismissed after a preliminary hearing.

My review of the evidence indicates that this dismissal was premature and unjustified. Mr. Dohaish was killed as the result of a blow to his head from a pool cue swung

by Mr. Santistevan. The force of the blow was so strong that it broke the pool cue in two pieces. Mr. Dohaish was unarmed and no bigger in physical stature than Mr. Santistevan. We feel that to dismiss this case without a trial does a great injustice to the American and the State of Colorado's system of justice.

Would you please reconsider your office's action and reinstitute the case. We look forward to your prompt reply.

Sincerely,

Reda A. Kabli, Ph.D.
Educational Attache

RAK/jka

STATE OF COLORADO

Office of
District Attorney
Denver

March 12, 1979

Dr. Reda A. Kabli
Educational Attache
2223 West Loop South - Suite 400
Houston, Texas 77027

Re: People vs. Santistevan
CR 131711

Dear Mr. Kabli:

Thank you for your letter of 21 February, 1979. I have again reviewed the file in the above-captioned case and I regret that we are unable to reopen the action against Eddie Santistevan. The evidence developed at the preliminary hearing established that just before the blow was struck, Santistevan was walking away from Saud Dohaish when Mr. Dohaish grabbed Santistevan and turned him around. The evidence showed that Mr. Dohaish was also armed with a pool cue and he was holding it in a threatening manner. As Santistevan was being turned around, he struck the single blow which caused the death of Mr. Dohaish.

Under Colorado law, the prosecution must prove beyond a reasonable doubt that the defendant was <u>not</u> acting in self-defense. As revealed by the police department's investiga-

tion and the evidence adduced at the preliminary hearing, the prosecution's evidence could not meet this burden of proof. In fact, the evidence showed the defendant was acting in self=defense. With this evidence, justice would not be served by the further prosecution of Mr. Santistevan.

I am sorry I can not be of any help, but if you have further questions, please advise.

Yours very truly,

DALE TOOLEY
District Attorney

LO:hp

NO. 81-2198

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ABDULLAH MUHAMMAD, Petitioner,

vs.

DALE TOOLEY, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT,
DALE TOOLEY, IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a cause of action exist for a private person to seek civil remedies against a district attorney for his refusal to prosecute a suspect.

2. Is a district attorney absolutely immune from liability in civil suits for activities performed within his prosecutorial duties.

3. Is a prosecutor a "court of last resort" if he is granted immunity from civil liability for acts performed within his prosecutorial discretion.

4. Do treaties between the United States and Saudi Arabia have any effect on the outcome of this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	-i-
AUTHORITIES	-iv-
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. The lower courts properly determined that since a private person does not have a right to demand another's prosecution, no cause of action exists for an individual to sue a district attorney for failure to prosecute.....	3
II. The lower courts correctly applied existing law to determine that the district attorney is absolutely immune from liability in civil suits for activities performed within his prosecutorial duties.....	5

TABLE OF CONTENTS - CONT'D.

Page

III. Petitioner's characterization of the prosecutor as a "court of last resort" ignores the checks and balances created by Colorado law on the exercise of prosecutor's charging discretion..... 10

IV. The treaty between Saudi Arabia and the United States is of no effect on the issues of this case..... 12

CONCLUSION 13

CERTIFICATE OF MAILING 14

TABLE OF AUTHORITIES

CASES:	Page
Axelson v. Summers. 369 F.Supp. 75 (D.C.E.D. Miss. 1973)	6
Black v. Stanley, et al., 270 F. Supp. 993 (D.C. Kan. 1967)	6
Dacey v. Dorsey, 568 F.2d (2nd Cir. 1978), cert. denied, 436 U.S. 906 (1978)	6
Dohaish v. Tooley, No. 81-1607 (10th Cir. Co. 1982) Appendix B, Petition for Writ of Certiorari	4
Imbler v. Pachtman, 424 U.S. 409 (1976)	6 7 8
Kalec v. Adamowski, 406 F.2d 536 (7th Cir. 1969)	6
Kostal v. Stoner, 292 F.2d 492 (10th Cir. 1961), cert. denied, 369 U.S. 868 (1962)	6

TABLE OF AUTHORITIES - CONT'D.

CASES:	Page
Linda R. S. V. Richard D., 410 U.S. 614 (1973)	4 5
Maynard v. Kear, 474 F.Supp. 494 (N.D. Oh. E.D. 1979)	6 7
People Ex. Rel. Van Meveren v. Dist. Ct. in and for Larimer County, 186 Colo. 355, 527 P.22, 50 (1974)	6
People v. Fowler, 183 Colo. 300, 516 P. 22, 428 (1973)	6
People v. McKenzie, 169 Colo. 521, 458 P.2d 232 (1973)	6
People v. Trigg, 184 Colo. 78, 518 P.2d 841 (1974)	6
Smith v. Dougherty, 286 F.2d 777 (7th Cir.) cert. denied, 368 U.S. 903 (1961)	6

TABLE OF AUTHORITIES - CONT'D.

CASES:	Page
United States v. Johnson, 577 P.2d 1305 (5th Cir. 1978)	11
Warth v. Seldin, 422 U.S. 490 (1975)	5
STATUTES	
Colo. Rev. Stat. § 16-5-209 (1973) ..	10
TREATISES	
ABA Standards, "The Prosecution Function" § 3.9 (1971)	7 9
TREATIES	
U.S.T. 203.2804. TIAS 6749	12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ABDULLAH DOHAISH, Petitioner,

vs.

DALE TOOLEY, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT, DALE TOOLEY, IN OPPOSITION

STATEMENT OF THE CASE

On February 23, 1981 Mr. Abdullah Dohaish commenced an action in Federal District Court against district attorney, Dale Tooley, alleging that Mr. Tooley's refusal to prosecute Mr. Eddie Santistevan, the alleged murderer of Plaintiff's son, was based upon discrimination against Arab Nationals and violated the Plaintiff's statutory and constitutional rights.

Defendant filed a Motion to Dismiss the case alleging that a district attorney is absolutely immune from liability in civil suits for actions taken within the scope of

his prosecutorial duties. The trial court granted the motion finding both that Plaintiff had no standing to pursue the action on his own behalf or on behalf of his deceased son and that the doctrine of prosecutorial immunity provided to the defendant absolute immunity from suit.

Plaintiff appealed the dismissal to the Court of Appeals for the Tenth Circuit. After briefs and oral argument the Tenth Circuit upheld the trial court's dismissal finding that the doctrine of prosecutorial immunity barred the suit and that no cause of action existed to sue the prosecutor for failure to prosecute.

Plaintiff's Petition for Writ of Certiorari contains extensive recitation of the facts of this case in addition to those found in the complaint. Because the district court dismissed the case without any type of evidentiary hearing, there actually is no factual evidence before the court relating to the events surrounding the death of Saud Dohaish or the reasons for non-prosecution. Further, the numerous "facts" not contained in the record, but recited in the Petition are not necessary to a resolution of this case because the issues to be decided are purely legal: 1) whether, as a matter of law a civil cause of action exists against a district attorney for failure to prosecute, and 3) whether, as a matter of law, the district attorney is immune from suit for acts performed within his prosecutorial duties.

REASONS FOR DENYING THE WRIT

Contrary to Petitoners' suggestions, this case is not appropriate for review by Writ of Certiorari. The case presents no question of federal law not already decided by the Supreme Court and presents no question of federal law which has been decided differently by the circuits or has been decided differently from previous decisions of this Court. In fact, the lower courts correctly decided the cause of action, and immunity questions presented by this case in compliance with existing case law established by this Court. There exists no compelling reason for this Court to review this case, and the Petition for Certiorari should be denied.

I.

THE LOWER COURTS PROPERLY DETERMINED THAT BECAUSE A PRIVATE PERSON DOES NOT HAVE A RIGHT TO DEMAND ANOTHER'S PROSECUTION, NO CAUSE OF ACTION EXISTS FOR AN INDIVIDUAL TO SUE A DISTRICT ATTORNEY FOR FAILURE TO PROSECUTE.

The Court of Appeals correctly ruled that no cause of action exists for a party to sue a district attorney to force prosecution of another or for damages for failure to prosecute.

Plaintiff attempts to create a cause of action by arguing that as the deceased's father he has a "reasonable expectation" that his son's suspected murderer will be brought to trial. Plaintiff contends that violation of this "reasonable expectation" creates a

right to pursue an action against the district attorney for failure to prosecute. The trial and appellate courts below correctly found that there is no law in the United States that grants to any individual an expectation of the prosecution of another. The lower courts' refusal to allow private citizens to force prosecution by the district attorney or sue for damages for non-prosecution is founded on sound public policy principals. As noted by the court of appeals:

> Such a right is not recognized in the law, and indeed, it would be contrary to public policy to allow every private citizen to force the prosecutor to proceed with a case in pursuit of a private objective. The district attorney is sworn to uphold the law generally and does not have a duty to enforce the law for the purpose of providing satisfaction to a third person who has no direct legal interest.

Dohaish v. Tooley, No. 81-1607 (10th Cir., Co., 1982) (emphasis added).

The refusal of the trial and appellate courts to recognize a cause of action for the district attorney's failure to prosecute is based, in part, upon this Court's decision in Linda R. S. v. Richard D., 410 U.S. 614 (1973). There, plaintiff filed suit

to force the district attorney to sue the defendant, her ex-husband, for failure to pay child support. This court rejected such a suit stating:

> [I]n American Jurisprudence, at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.

410 U.S. 614, 619 [emphasis added].

Because there is no recognizable right to have a suspected criminal prosecuted, there is no recognized claim constitutional, or otherwise, to pursue an action based upon violation of that nonexistent right. See, e.g., Warth v. Seldin, 422 U.S. 490, 509 (1975).

Plaintiff's Petition for Writ of Certiorari presents no compelling reasons why this Court should recognize, in violation of existing law and sound public policy, a new cause of action allowing a private person to contest the district attorney's decision not to prosecute.

II.

THE LOWER COURTS CORRECTLY APPLIED EXISTING LAW TO DETERMINE THAT THE DISTRICT ATTORNEY IS ABSOLUTELY IMMUNE FROM LIABILITY IN CIVIL SUITS FOR ACTIVITIES PERFORMED WITHIN HIS PROSECUTORIAL DUTIES.

Plaintiff's complaint is nothing more than an attempt to obtain damages and injunctive relief against the prosecuting

attorney for acts performed within the scope of the prosecutorial function. The specific act alleged is that Mr. Tooley refused to prosecte Eddie Santistevan and in so doing violated the constitutional rights of the decedent and his father who had an expectation of prosecution.

It is well established that the district attorney is a quasi-judicial officer when exercising his prosecutorial duties and is therefore immune from civil suits for damages resulting from acts performed during the exercise of his prosecutorial duties and discretion. Imbler v. Pachtman, 424 U.S. 409 (1976); Kostal v. Stoner, 292 F.2d 492, 493 (10th Cir. 1961), cert. denied, 369 U.S. 868 (1962); Dacey v. Dorsey, 568 F.2d 275 (2nd Cir. 1978), cert. denied, 436 U.S. 906 (1978); Kalec v. Adamowski, 406 F.2d 536 (7th Cir. 1969); Smith v. Dougherty, 286 F.2d 777 (7th Cir.) (cert. denied) 368 U.S. 903 (1961); Maynard v. Kear, 474 F. Supp. 794 (N.D. Oh. E.D. 1979); Axelson v. Summers, 369 F. Supp. 75 (E.D. Mo. 1973); Black v. Stanley, et al., 270 F. Supp. 993 (D. Kan. 1967). As part of the prosecutorial function the district attorney has discretion to decide whether to file a complaint for a violation of the state's criminal statutes and discretion to determine under what statutes he will prosecute. People v. McKenzie, 169 Colo. 521, 458 P.2d 232 (1969); People v. Fowler, 183 Colo. 300, 516 P.2d 428 (1973); People v. Trigg, 184 Colo. 78, 518 P.2d 841 (1974); and People ex. rel. Van Meveren v. District Court In And For Larimer County, 186 Colo. 335, 527 P.2d 50 (1974). Exercise of this discretion by the district attorney is

clearly within his prosecutorial duties. Maynard v. Kear, 474 F. Supp. 794 (N.D. Oh. E.D. 1979).

All of the acts of which the Plaintiff complains are related to actions of Mr. Tooley in his prosecutorial function, i.e. the decision whether or not to charge a suspect. Following a preliminary hearing on this matter and upon consideration of the evidence presented therein, the prosecutor concluded that the accused acted in self defense and that the murder charge could not be proven beyond a reasonable doubt. As such, it was not only within the discretion of the prosecuting attorney, but mandated by his duties to the office to refrain from filing criminal charges when those charges could not, in his estimation, be proven. The American Bar Association's Standards Relating to the Administration of Criminal Justice, "The Prosecution Function" § 3.9(b) (1971).

Plaintiff contends that the absolute immunity granted in Imbler v. Pachtman should apply only when the prosecuting attorney makes the decision to prosecute but not when the prosecuting attorney makes the decision not to prosecute. Clearly this distinction is without a basis in law or reason. The reasons for the prosecutorial immunity are clearly set forth in Imbler v. Pachtman. In summary those reasons are:

(1) The prosecutor would be subject to numerous suits by those who were prosecuted and then had charges dismissed or unproven at trial (Imbler at 421).

(2) "Harassment by unfounded litigation would cause a deflection of the pros-

ecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." (Imbler at 423).

(3) If the prosecutor could be made to answer in court each time that he charged an individual with wrongdoing his energy would be spent in attending to those suits as opposed to being spent in carrying out the duties of his office. (Imbler at 425).

(4) Various post-trial procedures are available to the defendant if he has not received a fair trial at the hands of the prosecuting attorney.

(5) Allowing the prosecutor to be subject to criminal suit would not serve the public interest since the prosecutor could not fearlessly and vigorously perform his duties as a prosecutor. (Imbler at 428).

The above considerations are equally applicable where suits are brought by grieving relatives or injured parties against the prosecutor for refusal to pursue criminal charges against a suspect. The prosecutor could be subject to undue harassment for refusal to prosecute those who the injured parties or relatives felt caused the injury. The threat of such suits might coerce a prosecutor to pursue cases, in violation of his ethical duties, where he did not feel that probable cause existed or cases which could not be proven beyond a reasonable doubt. If civil suits were allowed for failure to prosecute, the exercise of prosecutorial discretion would be unduly influenced by public

opinion. Such influence could result in charges being brought against innocent persons or in charges being brought when the prosecutor knew that the charges would not be substantiated at trial, whether or not the prosecutor believed in the suspect's guilt or innocence.

If private citizens were allowed to interfere with the discretionary decisions of the district attorney in deciding which suspects to prosecute independence of the office would be destroyed. The prosecutor would be unable to act within the ethical standards established by the American Bar Association relating to the exercise of the prosecutorial function. The Standards Relating to the Administration of Criminal Justice "The Prosecution Function" § 3.9 pg. 73-99 (1971) state the various considerations a prosecutor should review before filing charges against a suspect. This standard recognizes that in certain situations, there are reasons for nonprosecution even though the prosecutor may believe the suspect is guilty. The standard specifically states:

> (a) It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause.

Id. § 3.9(b) (1971) (emphasis added).

Petitioner has presented no compelling reason why the long-established and well-founded doctrine of absolute immunity for prosecutors acting within the scope of their prosecutorial duties should be limited in cases of nonprosecution.

III.

PETITIONER'S CHARACTERIZATION OF THE PROSECUTOR AS A "COURT OF LAST RESORT" IGNORES THE CHECKS AND BALANCES CREATED BY COLORADO LAW ON THE EXERCISE OF THE PROSECUTOR'S CHARGING DISCRETION.

Petitioner alleges that this court should grant only qualified immunity to prosecutors when they refuse to prosecute a case, because otherwise the prosecutor becomes the "court of last resort." This characterization is without support. In the specific case of Saud Dohaish, remedies, other than a civil suit against the prosecutor, were available if petitioner felt that the prosecutor did not properly exercise his discretion by not filing charges.

Pursuant to Colo. R. Stat. § 16-5-209 (1973) Mr. Dohaish could have filed an action requesting a judge to issue an order to the prosecuting attorney to show cause why he had not pursued the case or not filed charges against Mr. Santisteven. The prosecuting attorney would then have been required to present to the court the reasons why he did not bring charges. If the court felt the charges should have been brought the court could direct the prosecuting attorney to file the charges and appoint a special prosecutor to handle the case. The purpose

of the statute is to allow a person who feels the prosecuting attorney is not pursuing a case diligently or not filing charges for improper reasons, to seek court review of the prosecutor's actions.

Additionally, Abdullah Dohaish could have filed a wrongful death action against Eddie Santistevan for the death of Saud.

Further, in the instant case it is important to remember that the charges were not dismissed by the prosecuting attorney, but by the court upon motion of the prosecuting attorney. The court heard the evidence presented at the preliminary hearing and could have, if in the court's belief such action was justified, refused to dismiss the charges against Mr. Santistevan. Petitioner has recognized the court's authority to refuse to dismiss charges. United States v. Johnson, 577 F.2d 1304, (5th Cir. 1978).

The above safeguards effectively provide to the private citizen the opportunity to challenge the prosecutor's decision by obtaining a court's review of the prosecutor's actions.

Petitioner has presented no compelling reason to limit the absolute immunity granted to prosecutors for refusal to prosecute, and therefore the Petition should be denied.

IV.

THE TREATY BETWEEN SAUDI ARABIA AND THE UNITED STATES IS OF NO EFFECT ON THE ISSUES OF THIS CASE.

Petitioner cites a Treaty between the United States and Saudia Arabia U.S.T. 203.2804 TIAS 6749, to imply that the actions of the district attorney in failing to prosecute were in violation of the Treaties between the United States and Saudi Arabia. The Treaty provides that:

> Each government shall use its best efforts to extend to citizens of the other country engaged in activities pursuant to this agreement such favorable treatment with respect to entry, travel, duty free entry of personnel effects, a residence, and exit as is consonant with its national laws and regulations.

U.S.T. 203.2804. TIAS 6749, Article IX.

The existence of this treaty and entrance into the United States of Saud Dohaish under this treaty is of no relevance to the facts of the case. There is nothing to suggest that Saud Dohaish was granted any less or any greater rights than any citizen of the United States. There is no constitutional issue involved in the existence of this treaty and no reason for this court to hear the

present case based upon the existence of that treaty.

CONCLUSION

Because the lower courts' decisions are based upon sound case law previously established by this Court the Petition for Certiorari should be denied.

DATED this 11th day of June, 1982.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 1982, a true and correct copy of the above was placed in the United States mail, postage prepaid, properly addressed as follows:

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